CHUT NYAK ISHAM NYAK ARIFF

v.

MALAYSIAN TECHNOLOGY DEVELOPMENT CORPORATION SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMED APANDI ALI J
[SUIT NO: D10 (D1)-22-878-2008]
6 APRIL 2009

CIVIL PROCEDURE: *Stay of proceedings - Arbitration agreement - Referral of dispute to arbitration - Whether application for stay of proceedings allowed - Arbitration Act 2005, ss. 10, 18*

This was an application by the first defendant by way of a summons in chambers, for further proceedings in this action be stayed pending reference to arbitration. The application for stay was made pursuant to the respective arbitration clauses in three agreements between the parties. The plaintiff, in opposing this application for stay, claimed that it fell under one of the exceptions of the s. 10 of the Arbitration Act 2005, namely that the agreement was null and void.

Held (allowing application for stay of proceedings):

(1) This application for stay of proceeding was made under the provisions of s. 10 of the Arbitration Act 2005. Upon reading the provisions of s. 10, it was without doubt that the court should rise to the occasion to enforce the intended reforms of the Arbitration laws in this country, be it for domestic or international arbitration. As so worded in the provision, the court should be in favour of granting a stay. Not to grant a stay would be the exception and not the norm. The word 'shall' in the section is imperative in nature. The imperative nature is further amplified with the wordings in s. 10(3) of the said Act. In other words, the arbitral proceedings takes precedence over any court proceeding: Priority to be given to arbitral proceedings. Applying s. 10(1) read together with s. 18 of the Arbitration Act 2005, the application for stay of proceedings by the first defendant was hereby allowed. (paras 13 & 14)

Case(s) referred to:

Borneo Samudera Sdn Bhd v. Siti Rahfizah Mihaldin & Ors [2008] 5 CLJ 435 CA ***(refd)***

CMS Energy Sdn Bhd v. Poscon Corporation [2008] 1 LNS 543 ***(refd)***

Hiap-Taih Welding & Construction Sdn Bhd v. Boaustead Pelita Tinjau Sdn Bhd [2008] 1 LNS 401 ***(dist)***

Innotec Asia Pacific Sdn Bhd v. Inotec GMBH [2007] 8 CLJ 304 HC ***(refd)***

Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor [2008] 1 CLJ 496 HC ***(refd)***

Sunway Damansara Sdn Bhd v. Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 9, 10(1), (3), 18, 23, 25(2), 51(2)

For the plaintiff - M/s Haniff Khatri

For the defendant - Mohd Arief Emran Ariffin; M/s Skrine

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamed Apandi Ali J:

[1] Enclosure 9, is an application by the 1st defendant by way of a summons in chambers, for further proceedings in this action be stayed pending reference to arbitration.

[2] The application for stay is made pursuant to the respective arbitration clauses in three agreements (all dated 5 August 2005) between the parties. The three arbitration clauses in the respective agreements were:

(i) Clause 16.3 of the investment agreement (see exh. "MTDC 1" of encl. 8).

(ii) Clause 15.2 of the shareholders agreement (see exh. "MTDC 2" of encl. 8); and

(iii) Clause 10.1 of the option agreement (see exh. "MTDC 3" of encl. 8).

The Applicable Law Is The Arbitration Act 2005

[3] From the cause papers filed herein, the following findings are pertinent:

(i) Although the three agreements were executed in August 2005, the 1st defendant issued the notice to arbitrate *vide* their solicitor's letter dated 4 June 2008 and served the said notice by registered post on the following day, on 5 June 2008.

(ii) By the issuance and serving of the notice to arbitrate (as in exh. "MTDC 4" of encl. 8) the 1st defendant had, in law, commenced the arbitral proceedings on or about 5 June 2008, much after the date when the Arbitration Act 2005 came into force, namely on 15 March 2006.

(iii) Based on the above premise and applying s. 51(2) of the Arbitration Act 2005, the relevant law applicable for purposes of this application for stay is the Arbitration Act 2005. A *fortiori*, the plaintiff himself has conceded on this matter by acknowledging the applicability of s. 10 of the Arbitration Act 2005 (see para 5.6 of plaintiff's affidavit in reply, encl. 11).

The plaintiff in opposing this application for stay, claimed that it falls under one of the exceptions of the s. 10 of the Arbitration Act, namely that the agreement is null and void.

Applying The Law To The Facts

[4] Without doubt, the three respective clauses in the three respective agreements between the parties, are by themselves "arbitration agreements" within the meaning of s. 9 of the Arbitration Act 2005. Section 9 of the Act reads as follows:

Definition and form of arbitration agreement

9. (1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

A (4) An arbitration agreement is in writing where it is contained in:

(a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means
B of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

C

(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

D **[5]** Learned counsel for the plaintiff submitted that where issues of fraud are pleaded, the repealed provision of the old s. 25(2) Arbitration Act 1952 is still applicable and he relied on the case of *Hiap-Taih Welding & Construction Sdn. Bhd. v. Boaustead Pelita Tinjau Sdn. Bhd.* [2008] 1 LNS 401.

E

[6] The above-cited case, can be distinguished with the case today, as in that case, the learned trial judge made a finding and held that the Arbitration Act 1952 was the applicable law. On the other hand, as explained above, the applicable law in today's case
F is the current Arbitration Act 2005.

[7] That being so, the court must also look at the other relevant provisions of the Arbitration Act 2005.

G **[8]** Section 23 provides for the definition of Commencement of arbitral proceedings. The section reads as follows:

Commencement of arbitral proceedings

23. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on
H the date on which a request in writing for that dispute to be referred to arbitration is received by the respondent.

I

[9] Section 51(2) provides for the time frame during the transitional period of the repealed Arbitration Act 1952 and the date of coming into operation the Arbitration Act 2005. Section 51(2) reads as follows:

Repeal and savings

51. (2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.

[10] Section 18 provides for the competency of the arbitral tribunal to rule on the validity of arbitration agreements. Section 18 reads as follows:

Competence of arbitral tribunal to rule on its jurisdiction

18. (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For the purposes of subsection (1):

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause.

(3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

(5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

A (7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.

(8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within
B thirty days after having received notice of that ruling appeal to the High Court to decide the matter.

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

C (10) No appeal shall lie against the decision of the High Court under subsection (8).

[11] This application for stay of proceeding is obviously made under the provisions of s. 10 of the Arbitration Act 2005. Section
D 10 reads as follows:

Arbitration agreement and substantive claim before court

10. (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall,
E where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:

(a) that the agreement is null and void, inoperative or incapable of being performed; or

F

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

G

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

H **[12]** Section 10 above must also be read with all the other relevant provisions of the Act, namely s. 18, which touches on the competency of the arbitrator itself to decide on the validity of any arbitration agreement. It is of interest to note that sub-section 18(8) allows the aggrieved party to appeal to the High Court
I against the ruling on a preliminary question, such as on validity of

the arbitration agreement. It is also of further interest to note that the decision by the High Court is final in nature. This is part of the jurisprudence which formed the basis of the legislature's desire to reform the law relating to arbitration, which gave birth to the Arbitration Act 2005.

[13] Upon reading the provisions of s. 10, it is without doubt that the court should rise to the occasion to enforce the intended reforms to the Arbitration laws in this country, be it for domestic or international arbitration. As so worded in the provision, the court should be in favour of granting a stay. Not to grant a stay would be the exception and not the norm. The word "shall" in the section is imperative in nature. The imperative nature is further amplified with the wordings in s. 10(3) of the Act.

[14] The wordings in s. 10(3) reads as follows:

> (3) Where the proceedings referred to in subsection (1) have been brought, the arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

In other words the arbitral proceedings takes precedent over any court proceeding: Priority is to be given to arbitral proceedings!

[15] On this matter too, I am also guided by a host of recent decisions, such as:

(1) By the Court of Appeal in *Borneo Samudera Sdn. Bhd. v. Siti Rahfizah bt. Mihaldin & Ors* [2008] 5 CLJ 435;

(2) *Innotec Asia Pacific Sdn. Bhd. v. Inotec GMBH* [2007] 8 CLJ 304.

(3) *Standard Chartered Bank Malaysia Bhd. v. City Properties Sdn. Bhd. & Anor* [2008] 1 CLJ 496;

(4) *Sunway Damansara Sdn. Bhd. v. Malaysia National Insurance Bhd. & Anor* [2008] 3 MLJ 872.

(5) *CMS Energy Sdn Bhd v. Poscon Corporation* [2008] 1 LNS 543;

[16] In conclusion, based on the above, and applying s. 10(1) that is read together with s. 18 of the Arbitration Act 2005, the application for stay of proceedings by the 1st defendant as prayed in encl. 9, is hereby allowed, with costs.